

# Introduction to public law

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## Studying public law

Public law is the label given to the laws regulating the state. It may be contrasted with private law, which regulates relationships between individuals such as contracts and marriages.

For the purposes of study, public law comprises constitutional law and aspects of administrative law. Constitutional law is concerned with the role and powers of the institutions within the state and the relationship between the citizen and the state.

Studying public law successfully involves acquiring an understanding of a variety of historical, legal and political factors that have shaped the organisation of the state. This is because, in the United Kingdom (UK), unlike the majority of states around the world, there is no comprehensive, single document known as ‘the Constitution’. Aside from conflict in the seventeenth century (see Chapter 15), the constitution has evolved gradually and peacefully over the centuries, and there has never been the need to set all the rules down in a written constitution. As a result, the constitution is contained in numerous legal and non-legal sources – Acts of Parliament, decisions of the judges, the legal powers of the Crown and obligatory but non-legal rules.

The constitution is dynamic, and particularly since 1997, when the Labour government came into power, there has been considerable constitutional reform. In addition to studying from textbooks and the law reports it is also necessary to keep up to date with current affairs and be aware of changes actual and proposed, which may affect the working of the state.

## The United Kingdom

The UK comprises England and Wales, Scotland and Northern Ireland. Northern Ireland, Scotland and Wales each has its own legislative body (the Parliament in Scotland, Assemblies in Northern Ireland and Wales) with differing levels of law-making power. The ultimate power to make law for each of the nations lies with the UK Parliament in London.

The Head of State is the Queen and all acts of government are undertaken in her name. Equally, the Queen is the ‘fountain of justice’ and all the actions of the judges are undertaken in her name: the courts are the Queen’s courts. While the Crown has wide-ranging legal powers (for the royal prerogative, see Chapter 2), the government mostly exercises these today on her behalf.

Although a ‘united kingdom’ with one Crown and one supreme legislature, the UK has more than one legal system. Scotland has always had its own distinctive legal system, one protected under the Acts of Union 1706/1707. Northern Ireland also has its own system. Only England and Wales share a legal system. Devolution of power to national assemblies also reflects diversity within the UK. While Northern Ireland experienced a high degree of legislative autonomy between 1922 and 1974, the civil unrest in the Province resulted in law-making power being recalled to the UK Parliament at Westminster. In 1997 the Labour government was intent on devolving power not only back to Northern Ireland but also to Scotland and Wales. The Northern Ireland Act, Scotland Act and Government of Wales Act 1998 gave effect to devolution (see Chapter 7).

## What is a constitution?

Every organisation – whether a state or a university or a trade union or a club – will have a constitution – a set of rules defining the structure and working of the organisation. The constitution of a state will define the principal institutions – the executive, legislature and judiciary – and the nature and scope of their powers. In addition, a constitution will usually define the rights and freedom of citizens, rights with which the government cannot lawfully interfere. Very broadly, a constitution of a state may be defined as being:

... the whole system of government of a country, the collection of rules which establish and regulate or govern the government.<sup>1</sup>

## Classifying constitutions

Constitutions may be:

- written or unwritten;
- republican or monarchical;
- flexible or rigid;
- unitary or federal;
- supreme or subordinate;
- have clearly separated powers or fused powers.

A written constitution is one contained within a single document or a series of documents defining the basic rules of the state. The origins of written constitutions lie in the American War of Independence (1775–1783) and the French Revolution of 1789. More recently, written constitutions have been drafted in the process of dismantling a colonial relationship and restoring independence to a country.

The feature that is common to all countries with a written constitution is that at some point in time there has been a clear break from former constitutional arrangements, providing the opportunity for a fresh start.

A republican state is one having as its figurehead a (usually) democratically elected president. By contrast, a monarchical state is one having as its head of state a king or queen. In Britain the Crown is hereditary, with the line of succession being defined under the Act of Settlement 1700. This restricts the succession to members of the Protestant faith and specifically excludes Roman Catholic. Male heirs take precedence over female heirs.

A flexible constitution is one that may be amended with ease. A rigid constitution, by contrast, is one where there are stringent procedures to be followed before reform can take place. The constitution is usually written, and the rules for reform ‘entrenched’ – that is, incapable of or exceedingly difficult to reform. Common conditions for amendment would include the need for strict majorities in both Houses of the legislature to agree to reform, and for the proposal to be approved by the people in a referendum.

A unitary state is one with a highly centralised government and legislature, which enacts laws governing the whole state. A federal state is one where the power is divided between central government and more localised state governments. The constitution will define the allocation of power between central and state government.

A supreme constitution is one that is not controlled by any higher source of power. On the other hand, a subordinate constitution is one that has (usually) been conferred by a higher power, with that higher power being able to extend or restrict the degree of autonomy enjoyed by the subordinate state. Subordinate constitutions are usually the product of colonialism, largely but not completely abandoned in the twentieth century.

Constitutions may also be classified according to whether they have separated powers or not. Separation of powers (see Chapter 3) is an ancient concept requiring that the personnel, functions and powers of the principal institutions of the state – the executive, legislature and judiciary – are separate. The purpose of the separation of powers is to avoid the concentration of power in one ‘pair of hands’, which could lead to the abuse of power. A state with a poor, or nonexistent, separation of powers is likely to be a dictatorship, with no system of checks and balances to avoid the abuse of power.

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<sup>1</sup> Wheare, KC, *Modern Constitutions*, 1966, Oxford University Press.

## Characteristics of the United Kingdom constitution

The British constitution today is largely written but uncodified (not brought together in a single document), has a constitutional monarchy, is unitary but with powers diffused among different levels of government (central, regional and local), and highly flexible. Unlike states whose constitutions set out complex procedures for constitutional reform, in the UK an ordinary Act of Parliament can achieve fundamental reforms.

The UK's constitution is not controlled by any higher power, and accordingly may be described as supreme rather than subordinate. This last point needs qualifying in the sense that since 1973, Britain has been a member of the European Community, and now the wider European Union (EU). As such, domestic law must be in line with EU law (see Chapter 6 on this). However, membership is voluntary, and any restriction on Britain's law-making power is accepted as one of the terms of membership.

Only three countries have an unwritten, or uncodified, constitution: Britain, Israel and New Zealand. In the absence of a written constitution – which is the ultimate authority with a state – the void is filled by the concept of the sovereignty of Parliament. Parliament may – subject to non-legal restraints such as politics and economics – legislate on any subject whatsoever (see Chapter 5). Also central to the UK's constitution is the relationship between the three major institutions of the state – the executive, the legislature and the judiciary. While most states have a clear separation of powers and personnel between these institutions, the UK arrangement is more one of checks and balances, so that where overlaps occur, any potential abuse of power is avoided by legal rules or by the non-legal but binding rules of the constitution – constitutional conventions (see Chapter 2).

To conclude, the British constitution:

- is largely unwritten in character;
- flexible;
- supreme;
- formally unitary, but with powers devolved to Northern Ireland, Scotland and Wales;
- has mainly but not completely separated powers;
- is monarchical.

1. Write a brief definition of a Constitution.
2. List at least four characteristics that constitutions may have (for example a constitution may be *federal* or *unitary*).
3. List at least four characteristics of the British constitution.
4. What are the primary characteristics of the British Constitution (you should be able to list at least three).